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VIA CERTIFIED MAIL AND E-MAIL

Chief Tom Tidwell
US Forest Service
Office of the Chief
1400 Independence Ave., SW
Washington, D.C. 20250-0003
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**Re: Request/Petition for Discretionary Review of Decisions Impacting
Chattooga Wild and Scenic River Management on Appeal**

Dear Chief Tidwell,

On behalf of **Georgia Forest Watch**, the **Georgia Chapter of the Sierra Club**, and **Wilderness Watch** (collectively, “Conservation Appellants”), I request that you exercise your discretion pursuant to Section 7(d)(1) of the Optional Appeal Procedures (“Appeal Procedures”) and review the decision (“Appeal Decision”) on the Conservation Appellants’ March 14, 2012, appeals (“Conservation Appeals”) of the decisions regarding management of the Chattooga Wild and Scenic River.¹ Section 17(b) of the Appeal Procedures directs that you “should consider . . . such factors as controversy surrounding the decision, the potential for litigation, whether the decision is precedential in nature, or whether the decision modifies existing or establishes new policy.” Consideration of each of these factors suggests a clear need to review the Appeal Decision.

¹ On January 31, 2012, Forest Supervisor George M. Bain, Acting Forest Supervisor Diane Rubiaco, and

- *Decision Notice and Finding of No Significant Impact: Amendment #1 to the 2004 Revised Land and Resource Management Plan Chattahoochee-Oconee National Forests, Managing Recreation Uses in the Upper Segment of the Chattooga Wild and Scenic River Corridor* (signed by Forest Supervisor George Bain on January 31, 2012) (hereinafter “GADN”).
- *Decision Notice and Finding of No Significant Impact: Amendment #22 to the Nantahala and Pisgah National Forests Land and Resource Management Plan, Managing Recreation Uses in the Upper Segment of the Chattooga Wild and Scenic River Corridor* (signed by Acting Forest Supervisor Diane Rubiaco on January 31, 2012) (hereinafter “NCDN”).
- *Decision Notice and Finding of No Significant Impact: Amendment #1 to the 2004 Revised Land and Resource Management Plan Sumter National Forest, Managing Recreation Uses in the Upper Segment of the Chattooga Wild and Scenic River Corridor* (signed by Forest Supervisor Paul Bradley on January 31, 2012) (hereinafter “SCDN”).

The Decisions Will Be Litigated & Have Great Potential to Establish Precedent

American Whitewater, together with other boating groups, has already sued the Forest Service in the U.S. District Court in Greenville South Carolina (*American Whitewater et al v. Tidwell et al*, 8:09-cv-02665-MGL) regarding management of boating on the Upper Chattooga. Specifically, at issue in that case are:

- Whether the Forest Service's prohibition of boating on the Upper Chattooga and its tributaries violates the Wild and Scenic Rivers Act ("WSRA"), the Wilderness Act, the Multiple Use Sustained Yield Act, the National Forest Management Act, the National Environmental Policy Act ("NEPA"), and the U.S. Constitution;
- Whether boating is an Outstanding Resource Value ("ORV") as defined in the WSRA;
- Whether the Forest Service is barred from regulating recreation on a W&SR prior to completion of a visitor capacity study; and
- Whether a managing agency may prohibit boating in a designated wilderness area.

Whiteside Cove Association, individual local landowners, and Georgia ForestWatch have intervened in that matter.

Conservation Appellants have raised issues in their appeal which, administrative options having been exhausted, may be litigated including:

- Whether in a discreet Comprehensive River Management Plan ("CRMP") is required for each Wild and Scenic River ("W&SR");
- Whether capacity limits must be established as standards rather than guidelines for W&SRs;
- Whether the Forest Service may require public use of non-system trails and other features for recreational access;
- Whether an adaptive management plan for a W&SR must include triggers for management changes before degradation occurs;
- Whether "interim" management changes may be implemented *before* site-specific National Environmental Policy Act ("NEPA") analysis has been completed;
- Whether wilderness must be managed first to protect resources before a new recreation use may be allowed; and
- Whether the Forest Service may ignore 36 C.F.R. § 261.77 in establishing boater registration.

Other appellants, including American Whitewater, have raised issues, which may now be litigated, including:

- Whether the Forest Service must establish user capacities before adding a new recreational use of a W&SR;
- Whether boating (or any other recreation mentioned at the time of designation) is an Outstanding Remarkable Value that must be allowed, removing the discretion of managing agencies, including the Forest Service, to restrict access to public lands;

- Whether the Forest Service must prioritize recreation above conservation in management of W&SRs and designated wilderness;
- Whether recreational uses in existence at the time of W&SR designation must be allowed to continue;
- Whether the Forest Service must allow new recreation in an already degraded area of a W&SR; and
- Whether observing others engaged in recreation is a fundamental part of the wilderness experience protected by the Wilderness Act.

The resolution of these issues is important to the future management of the Chattooga River and the Ellicott Rock Wilderness and to designated Wild and Scenic Rivers and wilderness areas generally. The case has great potential to be precedential because there is little case law on W&SR management, particularly in the East.

The Appeal Decision does not represent the Forest Service well. It fails to address a number of issues raised by Conservation Appellants and confuses others. It often cites portion of the administrative record that are not relevant to Conservation Appellants' concerns, and relies inappropriately on NEPA documents to provide management direction that has not been included in the Land and Resource Management Plans ("LRMPs") or any other enforceable document.

The Decisions are Controversial

The Decisions were opposed or questioned for various reasons by a large number of well-informed people and organizations, including:

- Six appellants or groups of appellants, including several national environmental and recreational organizations,
- Local homeowners,
- Dr. James T. Costa, Director of the internationally acclaimed Highlands Biological Station,
- David Jensen, former Chattooga District Ranger,
- Max Gates and Jim Barrett, former Andrew Pickens District Rangers, and
- Chris Liggett, Director of Planning for the Southern Region and a member of the Steering Team for the Chattooga River visitor capacity analysis.

The Decisions are controversial for the reasons raised in the Conservation Appeals, including, for example and briefly:

A. There is no Comprehensive River Management Plan for the Chattooga.

"The [Wild and Scenic River Act ("WSRA")] requires a single, comprehensive plan that collectively addresses all the elements of the plan--both the 'kinds' and 'amounts' of

permitted use--in an integrated manner.”² **The Appeal Decision states that the CRMP for the Chattooga is located in 11 discontinuous pages in the Sumter Revised LRMP, and that the LRMPs for the Nantahala and Sumter National Forests also contain standards and guidelines for managing the corridor.**³ Even were Appellants to concede that cobbled together these few pages constitute a CRMP, which they do not concede, this “plan” would be inadequate. The *Yosemite III* Court found inadequate a “plan” that was ostensibly contained in multiple volumes cross-referencing material from Yosemite National Park’s Comprehensive Management Plan.⁴ The Appeal Decision presents a worse scenario: management of the Chattooga contained within *three* LRMPs for three independent national forests, with no central document providing cross-references.⁵ This places a tremendous and unreasonable burden on members of the public wishing to participate in the decision-making process.⁶

B. Standards have not been established to prevent degradation of the River.

In managing a W&SR, “[a] *standard* must be chosen that does in fact trigger management action *before* degradation occurs.”⁷ Managers of W&SRs must establish “concrete measure[s] of use.”⁸ Conservation Appellants have shown repeatedly that the Decision Notices and existing LRMPs together do not establish any standards for the number of front country groups and people at one time or for the average groups and people per day for backcountry groups in the Upper Chattooga, although there are standards for the Lower Chattooga.⁹ In response to this concern, **the Appeal Decision cites to the EA, which assumes use of standards, instead of to the Decisions, which instead rely on unenforceable guidelines.** The Forest Service regularly argues that guidelines are not enforceable.¹⁰

² *Friends of Yosemite Valley v. Kempthorne* (“*Yosemite III*”), 520 F.3d 1024, 1036 (9th Cir. Cal. 2008); see also Attachment A to the Conservation Appeals, Declaration of Glen E. Haas (October 8, 2009) (“Haas Declaration”).

³ Appeal Decision, p. 1.

⁴ *Yosemite III*, 520 F.3d 1024, 1037 (9th Cir. Cal. 2008)

⁵ See Haas Declaration, p. 4 (American Whitewater’s expert complaining of the public burden presented by this situation).

⁶ An illustration of this difficulty is that changes to Chattooga WSR Corridor management are contained in three separate Decision Notices and three separate LRMPs. In this appeal, from time to time only one or two of the Decision Notices have been referenced when the changes to all three are identical or nearly so. **The reader should infer when reference is made to one or two of the Decision Notices that the other one or two is intended to be included as well, unless there is specific direction to the contrary.**

⁷ *Yosemite III*, 520 F.3d at 1034 (emphasis added).

⁸ *Friends of Yosemite Valley v. Norton* (“*Yosemite I*”), 348 F.3d 789, 797 (9th Cir. 2003); *Friends of Yosemite Valley v. Scarlett*, 439 F. Supp. 2d 1074 (E.D. Cal. 2006), *aff’d sub nom. Yosemite III*, 520 F.3d 1024 (9th Cir. 2008); *Yosemite III*, 520 F.3d 1024, 1039 (9th Cir. 2008).

⁹ NCDN, A-17, GADN, A-1.

¹⁰ See, e.g., *Earth Island Inst. v. Carlton*, 626 F.3d 462, 473 (9th Cir. Cal. 2010).

C. The Forest Service's own measure of use will already exceed the guidelines set in the Decisions.

Although the Forest Service was unable to estimate the number of boaters likely to use the Upper Chattooga during more than seven years of analysis, the *Asheville Citizen-Times* reported that spokeswoman for the Sumter National Forest, Michelle Burnett states that 60 to 100 boaters at one time are expected.¹¹ Capacity guidelines (again, not standards) establish backcountry average total people per day at 10 to 110, regardless of what their activity.¹² The expected use by boaters alone would already exceed those numbers. **The Appeal Decision did not address this point.**

D. The adaptive management framework is woefully inadequate.

Although one of the chief purposes of a CRMP is to set standards that “in fact trigger management action before degradation occurs”¹³ when the failure of the Decisions to do so was raised by Appellants, the Appeal Decision response was that monitoring is not considered a plan level decision and is “outside the scope of this decision.”¹⁴ **This is controversial because it indicates that the Forest Service does not think that essential elements of an adaptive management framework are appropriately part of the CRMP.**

E. The Decisions rely on immediate use of eroding non-system access features for which no NEPA analysis has been performed.

The Finding of No Significant Impact for selected Alternative 13A allowing boating was based on an analysis in which it was assumed that “[a]ll put-ins and take-outs would be designated and maintained to minimize sediment input to the river.”¹⁵ However, the Decisions instead put in place an “interim boating plan,” with no defined end date, that will require use of non-system trails and creation of put-ins and take-outs by boaters despite the fact that the Forest Service did not evaluate site-specific implementation activities in the 2012 EA.¹⁶ User-created features are “chronic sediment sources.”¹⁷ **The**

¹¹ See Attachment O to the Conservation Appeals, Karen Chavez, “Upper Chattooga now open to boaters,” *Asheville Citizen Times* (March 14, 2012)(available at: <http://www.citizen-times.com/article/20120315/OUTDOORS/303150014/Boaters-hit-Upper-Chattooga?odyssey=tab%7Ctopnews%7Ctext%7Cfrontpage>) (last accessed March 15, 2012).

¹² Chattooga Cliffs—10-15 people per day; Ellicott Rock—35-110 people per day; Rock Gorge—40-95 people per day; and Nicholson Fields—40-95 people per day. See GADN, p. A-2.

¹³ *Yosemite III*, 520 F.3d 1024, 1034 (9th Cir. Cal. 2008). The Forest Service Directives, require the same thing--that management plans for Wild and Scenic Rivers “[i]nclude specific and detailed management direction necessary to meet the management directives.” Forest Service Manual (“FSM”) § 2354.32.3.

¹⁴ Appeal Decision, p. 6.

¹⁵ Environmental Assessment: Managing Recreation Uses in the Upper Segment of the Chattooga Wild and Scenic River Corridor (January 2012) (“2012 EA”), p. 327, see also 2012 EA, pp. 39, 297, 328, 329.

¹⁶ 2012 EA; See, e.g., SCDN, p. 5 ¶ 9 (“Trails will be designated on future site-specific NEPA analysis”). This approach also ignores the Forest Service Manual which requires that the Forest Service “[f]ollow the

Appeal Decision misses the point of Appellants concerns while admitting to their existence, stating “[b]oaters would use these obvious routes [system trails or commonly used user-created trails] to the river until the agency has identified and/or developed a preferred route that minimizes biophysical impacts, redundancy with existing trails and user conflict.” The point of NEPA is to guide agency decision-making, not to evaluate the impacts of decisions already made and implemented.

F. The plan treats the Wild and Scenic River with less care than undesignated tributaries.

The Forest Service declined to allow any boating on the tributaries above Highway 28 “because of concerns regarding large woody debris, native brook trout restoration, vegetation removal, increased encounter levels, user-created trails, as well as enforcement and management issues.”¹⁸ **No reason has been given why these concerns exist for tributaries but not for the main stem of the Chattooga WSR Corridor.**

G. Decisions involve designated wilderness

Five miles of the designated Wild and Scenic River corridor pass through the Ellicott Rock Wilderness, which is already heavily impacted by use. The interim boating plan would encourage user creation of put-ins, take-outs and approach trails. This is not consistent with the wilderness objectives in the LRMPs for the National Forests, nor is it consistent with Forest Service’s wilderness and trail system policies which sets design parameters for wilderness access trails, including, for example:

- Appropriate trail width¹⁹
- Appropriate number of encounters²⁰

The Appeal Decision does not address these concerns.

H. Federal regulation prohibits self-registration for boating permits at the locations described in the Decisions, and also prohibits boating without a permit.

Unless authorized by a permit obtained through registration at Forest Service registration stations abutting the Chattooga River located at specific places at Highway 28 and below or unless authorized by special use permit, federal regulation prohibits:

- “Using or occupying any area of the Sumter National Forest or the Chattahoochee National Forest abutting the Chattooga River for the purpose of entering or going

direction in FSH 2309.18, Trails Management Handbook, chapters 10 and 20, when developing, reconstructing, or maintaining trails.”

¹⁷ 2012 EA, p. 297. See attached comments regarding proposed access routes, which are in poor condition.

¹⁸ GADN, p. 11.

¹⁹ See FSM § 2323, Forest Service Handbook (“FSH”) § 2309.18 Ch. 20.6-1; *see also* FSH 2309.18 Ch. 23.11-Exhibit 01 (design tread width for wilderness).

²⁰ *See, e.g.,* Nantahala LRMP, p. III-101.

- upon the River in, on, or upon any floatable object or craft of every kind or description,” and
- “Entering, going, riding, or floating upon any portion or segment of the Chattooga River within the boundaries of the Chattahoochee National Forest in, on, or upon any floatable object or craft of every kind of description”²¹

The Appeal Decision concludes that the proposed plans to place registration boxes at other places is legal, although it does a very poor and unconvincing job of explaining why that is so.

I. The LRMP amendments do not accomplish what the Forest Service intends.

Even with all of the problems the intended revisions cause, the actual language of the Decisions produces something even worse. **The Appeal Decision fails to address this concern at all.**

The Decisions Modify Existing Policy

For over thirty years the Forest Service has prohibited boating on the Upper Chattooga. The Decisions change that. Because of their potentially precedential impact, depending on the outcome of the federal lawsuit discussed above, the Decisions could impact management of other wilderness areas and W&SRs.

Thank you for your careful consideration of this request. If you have any questions regarding the content of this letter, previous information submitted by Conservation Appellants, or otherwise, please do not hesitate to contact me.

Sincerely,



Rachel S. Doughty
Attorney for Georgia ForestWatch, Georgia
Chapter of the Sierra Club, and Wilderness
Watch

²¹ 36 C.F.R. § 261.77 (a) & (d).